

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1387

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DOUGLAS STEWART,
Defendant-Appellant.

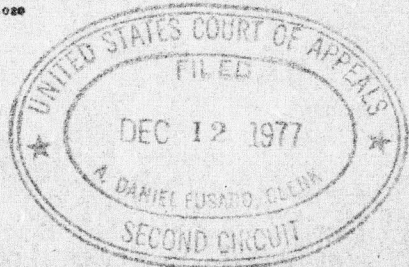
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

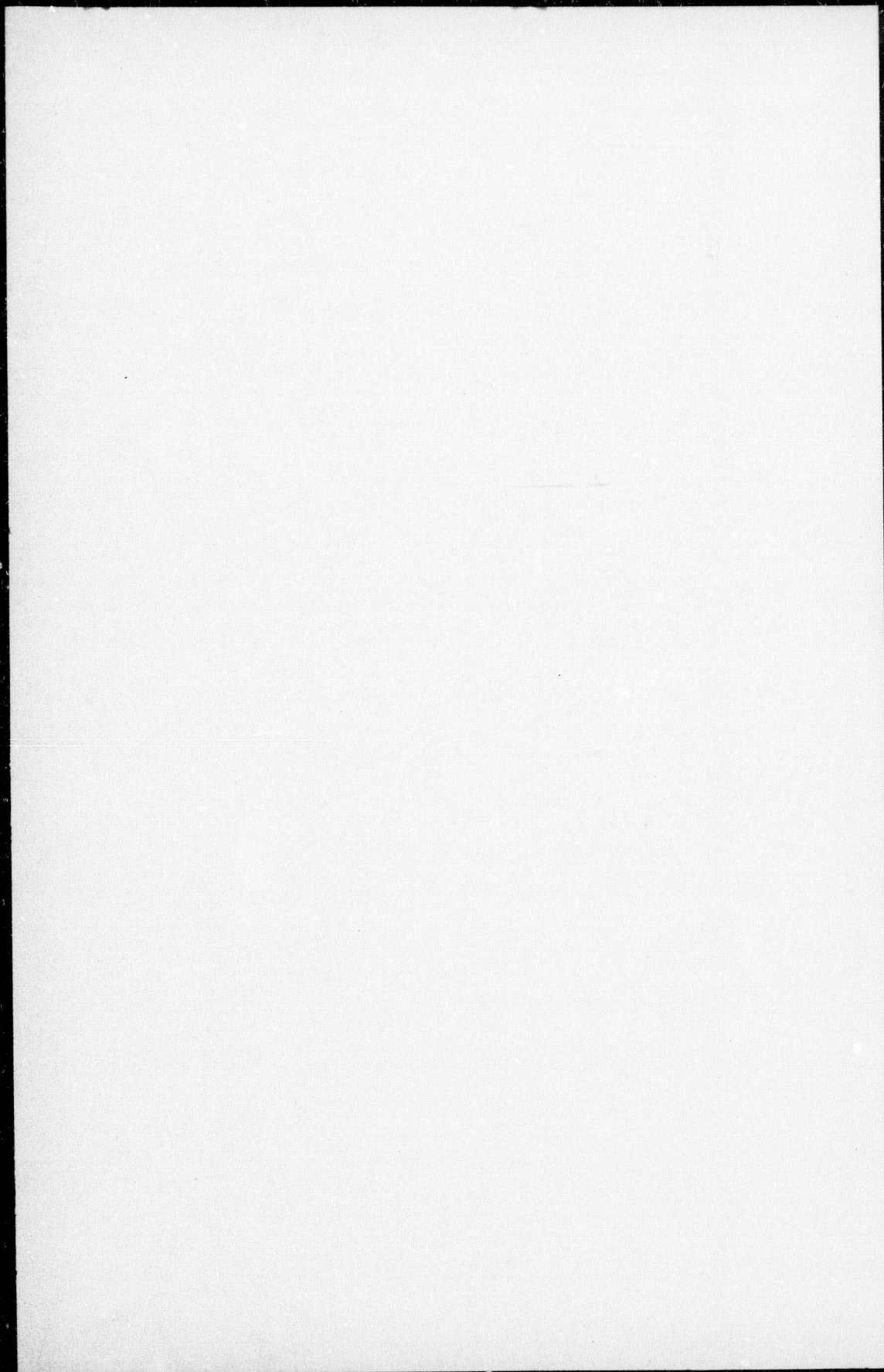
BRIEF FOR THE APPELLEE

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IN THE
United States Court of Appeals

For the Second Circuit

Docket No. 77-1387

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DOUGLAS STEWART,
Defendant-Appellant.

On Appeal From the United States District Court
For The Western District of New York

BRIEF FOR THE APPELLEE

Preliminary Statement

On July 31, 1975 the appellant, Douglas Stewart, and Stephen Castle, were arrested by agents of the Drug Enforcement Administration while they were sitting in an automobile owned and operated by Stephen Castle. Both were charged with possession of heroin with the intent to distribute based on certain controlled substances which had been found both in the automobile and in a subsequent search of Castle's home.

A complaint against Stewart was subsequently dismissed when the items which had been found on him proved to be

non-controlled and on June 17, 1976 a one count indictment was returned against appellant Stewart and his brother Robert Stewart alleging a conspiracy to distribute heroin in violation of Title 21, United States Code, Section 846. A motion to suppress a confession and statement made by Douglas Stewart to DEA agents was filed by the defendant and a hearing was held in front of the Hon. John T. Curtin on November 5 and November 20, 1976. After hearing testimony from two DEA agents, along with the defendant-appellant Douglas Stewart and his wife, Orvetta Stewart, Judge Curtin reserved decision and the matter was briefed by both the government and the defendant.

On April 22, 1977, Judge Curtin filed a written decision wherein he denied the motion to suppress the statement and the matter was subsequently tried before Judge Curtin commencing on June 3, 1977. The jury ultimately returned a verdict of guilty against Douglas Stewart and not guilty against Robert Stewart. Douglas Stewart was sentenced on August 31, 1977 to the custody of the Attorney General for a period of four years, with an additional special parole term of at least three years. The appeal which has been taken in this case by the appellant essentially concerns Judge Curtin's determination in denying the motion to suppress the statement and confession which had been given by Douglas Stewart to the DEA agents.

Statement of Facts

On July 31, 1975, after an extensive, ongoing DEA investigation, federal drug agents arrested Douglas Stewart and Stephen Castle in an automobile owned by Stephen Castle located at the corner of Delaware and Hertel Avenues in the City of Buffalo, New York, a short distance from Castle's

residence. (Gov. App. 5, 15-17, 98). This arrest was made at approximately 5:30 p.m. on that date and the subjects were returned to Mr. Castle's apartment where a search was conducted of the premises pursuant to a search warrant. (Trial Tr. 93-95). Various items were found in Stephen Castle's automobile including a quantity of alleged heroin.

The search at the apartment took approximately two hours during which time Mr. Castle and Douglas Stewart were under arrest and detained at Castle's residence. (Trial Tr. 152). A quantity of alleged heroin and numerous articles used in the cutting and packaging of controlled substances were found during the search of Castle's residence and when this search was completed, Stewart and Castle were taken to DEA headquarters. (Trial Tr. 150-152).

At approximately 7:30 p.m. on July 31, 1975 Stewart was taken to the DEA office for a routine processing which involved the taking of personal information, fingerprinting and photographing by DEA agents. (Gov. App. 19, 20). At approximately 9:00 p.m. that same evening that Stewart was initially interviewed by DEA agents Joseph Burns, William T. McDonald and Buffalo Police Officer Charles Wilson. (Gov. App. 5). Agent Burns testified at the suppression hearing that at the outset he read to Stewart from a standard form DEA card advising him of his *Miranda* rights and that in the reading he paused several times to ascertain if Stewart understood what was being said. (Gov. App. 22-24). Stewart stated at that time that he understood his constitutional rights and then Agent Burns requested that he read the form himself and then inquired if he understood its meaning to which Stewart responded in the affirmative. (Gov. App. 6, 7). Agent Burns then filled in the name, date and time that the form was read and asked Stewart if he would execute the waiver at that time.

(Gov. App. 7, 8). After the execution of the waiver by Stewart, the agents asked Stewart if he would like to give a statement concerning his involvement in these heroin activities and if he would cooperate with the government in its investigation. (Gov. App. 6-29). Burns advised him that any cooperation that he extended would certainly be brought to the attention of the court. Over the next 1½ to 2 hours, Stewart was interviewed by various DEA agents. This interview culminated at approximately 10:30 p.m. with Stewart's execution of a three-page handwritten statement which had been prepared by DEA agents. (Gov. App. 7).

At the suppression hearing Stewart took the stand and stated that his signed statement that night was not voluntarily given by him. (Gov. App. 60). In support of this claim, Stewart testified that at the time of the execution of the waiver and throughout the subsequent interview, that he was experiencing very severe physical withdrawal symptoms due to his heroin addiction. (Gov. App. 56, 57). He stated that he had a running nose, cold flashes, that he was sweating profusely and that he had various periods of nausea and diarrhea. (Gov. App. 56, 57).

This testimony, however, directly conflicted with that of Agent Burns and Agent Peterson, the arresting agent who had originally arrested Stewart and who observed him when he first arrived at DEA headquarters at approximately 7:30 p.m. on July 31, 1975. (Gov. App. 99, 100). They both testified that throughout the periods in question, Stewart appeared normal, showing no signs of any physical discomfort. Furthermore, Agent Peterson testified that he specifically directed questions to Stewart in an attempt to find out whether he was suffering any illness from his heroin addiction. (Gov. App. 102). Further, Agent Peterson testified that Stewart told him that he

had "just shot up" prior to his arrest and that he was not going to be sick and experience withdrawal. (Gov. App. 100). Agent Peterson further testified that Stewart did not request any medication nor did he ever ask to use the laboratory facilities while he was at DEA headquarters. (Gov. App. 100).

Stewart further claims that the statement was taken with the use of coercion, both psychological and physical, based on alleged statements made to him by the DEA agents. He stated that the agents initially informed him that there were more severe penalties he could face should he be turned over to the New York State authorities to be prosecuted as opposed to the lesser maximum penalty available under a federal prosecution. (Gov. App. 57). He has also claimed that the agents told him that he would be let out on bail if he gave a cooperative statement and that they were interested in primarily in getting a statement for use against Stephen Castle and not against himself, notwithstanding the fact that he admitted on the stand that he was aware when his rights were read to him that anything he said could and would be used against him. (Gov. App. 58, 62, 79).

There was testimony by Agent Burns that he advised Mr. Stewart that if he would cooperate with the government, that they would bring that cooperation to the attention of the prosecutor, although this statement was made after he had been advised of his rights and he had waived them. (Gov. App. 6). Although there was testimony that Stephen Castle, named as an unindicted co-conspirator in this instant indictment, was the main target of the DEA investigation, there was ample evidence that Stewart had been observed in surveillances prior to his being arrested in Castle's car at 5:30 p.m. on July 31, 1975. (Gov. App. 17).

After Stewart had been advised of his rights by Agent Burns and had stated that he understood these rights and then subsequently waived them, the taking of the actual three-page statement took approximately an hour and a half. (Gov. App. 7). At no time did he indicate that he wanted to stop talking and consult with an attorney or that he did not want to continue talking to them for any other reason. He also stated that when he was giving the statement to DEA agents that it was his "impression" that statements taken from him would be used against Castle.

Issues Presented

1. Whether the statement given by Douglas Stewart to federal agents was given voluntarily.
2. Whether the use of the statement at trial, if involuntarily given, amounted to anything more than harmless error.

ARGUMENT

POINT I

Confession given by Douglas Stewart to DEA agents was voluntarily given to DEA agents after he had been advised of and waived his *Miranda* rights.

Appellant Stewart claims that the statement which he gave to the Drug Enforcement agents on July 31, 1975 was not voluntarily given by him and that his acknowledged waiver of his *Miranda* rights was based on psychological or physical coercion.

In support of these claims Stewart and his wife took the stand at the suppression hearing held in this case and testified

that at the time of the execution of the waiver of his *Miranda* rights, and throughout the interview, the defendant was experiencing physical withdrawal symptoms based on his heroin addiction, including running nose, cold flashes, diarrhea, sweating and vomiting. (Gov. App. 56, 57). This testimony, however, directly conflicted with that of DEA Agents Burns and Peterson who testified that throughout the periods in question Stewart appeared normal, showing no signs of physical discomfort. (Tr. 39, 100-101). Agent Peterson, in fact, directed questions to Stewart concerning any possible drug problems he might have and received negative answers concerning whether he was going to be sick or whether he was in need of medication. (Tr. 100-101).

Stewart's claim of psychological or physical coercion which would vitiate the voluntariness of his confession is further premised on the alleged statements of DEA agents as to the possible maximum penalties he would face if prosecuted in state court as opposed to federal court, on an alleged promise of bail, and on the allegation by some agent that the statement would merely be used against Stephen Castle. (Gov. App. 56-58).

The court below, however, discounted the credibility of Stewart's testimony and found that he was merely under the "impression" that his statements would not be used against him, apparently crediting the testimony of Agent Burns. The court found that Stewart's own subjective evaluations of these statements and the DEA's request for his cooperation apparently led him to believe that by supplying information to the agents the course of his prosecution could be influenced. (Def. App. 2). Further, the court stated that there was directly conflicting testimony concerning his physical condition on the night of the confession and "credited the testimony of the

agents" in finding that the statement was not involuntarily given due to some drug addiction problem. (Def. App. 2).

The Supreme Court, and lower Federal Courts, have on numerous occasions enunciated the standard for determining voluntariness of a confession. The statement must be free and voluntary to be admissible, and "if an individual's will was overborn or if his confession was not the product of a rational intellect and a free will, his confession is coerced and inadmissible at trial." *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960) and *Townsend v. Sain*, 372 U.S. 293, 307 (1962).

The burden on the government in a suppression hearing is to show by the preponderance of all the evidence that Stewart's statement was "voluntarily" given. *Lego v. Toumey*, 404 U.S. 477. This Circuit has stated the law concerning voluntariness of confessions in *United States v. Ferrara*, 377 F.2d 16, 17, cert. denied, 389 U.S. 908 (1967) as follows:

The test of voluntariness [of a confession] is whether an examination of all the circumstances discloses that the conduct of 'law enforcement officials was such as to overbear [the defendant's] will to resist and bring about a confession not freely determined . . .' *Rogers v. Richmond*, 365 U.S. 534 (1961). See also, *United States v. Pomares*, 499 F.2d 1220 (2nd Cir. 1974).

Such overbearing can take the form of mental and psychological, as well as physical, coercion and psychological coercion alone may vitiate the voluntariness of any confession. *Chambers v. State of Florida*, 309 U.S. 227 (1940); *Blackburn v. Alabama*, *supra*.

In determining the voluntariness of a confession, the courts have examined numerous factors, including the number of interrogators, the length of questioning, the setting in which the questioning occurred, the age, experience and educational

level of the accused, his mental capacity, demeanor, coherence, articulations, capacity to make use of his faculties, fatigue, duration and type of interrogation, time of the day, the request for counsel and the desire to remain silent. *Spano v. New York*, 360 U.S. 315 (1959); *Haynes v. Washington*, 373 U.S. 503 (1962).

Certain factors have been codified under Title 18, United States Code, Section 3501(b) and include the delay in arraignment, knowledge by the defendant of the nature of the offense, advice as to his rights to remain silent, and to the assistance of counsel. It is all of these factors which would go into the "totality of circumstances" so that it must appear by the preponderance of the evidence that the confession was the product of deliberate and free choice. *Fykes v. Alabama*, 352 U.S. 191 (1957); *Jackson v. Denno*, 378 U.S. 368 (1964); *United States ex rel. Johnson v. Yaeger*, 327 F.2d 311 (2nd Cir. 1964).

At the suppression hearing Judge Curtin listened carefully to the government agents who were on the stand, and also to the defendant and his wife concerning their testimony of what had taken place during the interview. The court had tremendous latitude in evaluating the credibility of testimony given at a suppression hearing, including the ability to reconcile differing testimonies from various witnesses, crediting certain parts of the testimony of different witnesses, and choosing not to believe other areas. Stewart, in contesting these findings, apparently fails to appreciate the wide latitude this Court has given to the findings of triers of fact:

A trier in evaluating the testimony of witnesses, including government witnesses, is free to believe part of what a witness says and disbelieve the remainder. *United States v. Marris*, 269 F.2d 100, 193 (2nd Cir. 1959).

Judge Curtin in this case chose to credit the testimony of the agents in determining whether Stewart was laboring under the adverse effects of drug addiction during the time he gave the waiver of rights and the subsequent confession.

As to Stewart's contentions regarding the agents' comments on the availability of bail, the decision of the Second Circuit in *United States v. Ferrara, supra*, is dispositive. In *Ferrara* the defendant, after being advised of his rights was told by a federal agent that "if he cooperated with the U. S. Attorney he felt sure he would get out on reduced bail." The Court held that the confession subsequently given was voluntary even though federal agents had gone beyond simply urging the defendant to cooperate and had promised that he would be released on bail if he confessed. *United States v. Ferrara, supra*, at 18.

In *United States v. Pomares*, the defendant was told by officials of the DEA "that he faced heavy penalties for smuggling activities," and ". . . that he was his own best lawyer" and that "the wisest course of action would be to cooperate with the government rather than exercise his right to remain silent." The defendant agreed and confessed. Relying on *Ferrara*, the Second Circuit concluded that the agents' statements were not such as to overbear the defendant's will and render the confession involuntary. Similarly, in *United States v. Nussen*, 531 F.2d 15 (2nd Cir. 1976), the Court upheld the voluntariness of a confession obtained after agents told the defendant they would make no promises but would inform the U. S. Attorney of his intention to cooperate and then let him decide what to do.

Judge Curtin in his decision found that when the agents explained to the defendant that he could be charged in either state or federal court, that this was not a threat and "does not

make the statement involuntary." In evaluating the defendant's claim that he was promised that whatever statement he made would not be used against him, but would only be used against Stephen Castle, Judge Curtin found that Stewart's statement on the witness stand that he was "under the impression that statements taken from him would be used against Castle" were only suggestive evaluations placed on the words of the agents and not promises made by them. Stewart admitted on the stand that his rights had been read to him very carefully, that he understood the nature of the rights which were read to him, and that he was aware that one of the rights read to him that any statements he gave could and would be used against him. Judge Curtin therefore found that the defendant had been warned that the statement could be used against him. (Def. App. 3).

In those cases where confessions have been found to be involuntary due to physical or mental coercion, the circumstances presented were markedly different from the instant case. For example, *United States ex rel. Lewis v. Henderson*, 520 F.2d 896 (2nd Cir. 1975) the Court of Appeals upheld the defendant's claim of involuntariness in the face of various police promises to help the defendant with his case if he confessed, coupled with ample evidence of long periods of isolated confinement, up to 38 hours, and successive periods of questioning all without sleep or food. Furthermore, the case was a pre-*Miranda* case and therefore, the defendant was never informed of his right to remain silent or to have counsel appointed and present prior to any questioning.

More recently, in *United States v. DuVall*, 537 F.2d 15 (2nd Cir. 1976), the court held that a statement made by the Assistant U. S. Attorney—"that if the case goes to trial he can be sentenced to 100 years in prison"—made during a pre-arraignment interview following 20 hours of uncounseled inter-

rogation, violated the mandate of *Miranda* that defendant not be threatened, tricked or cajoled into a waiver. Again, there was ample evidence of physical and mental coercion present in this case. Also important to note is the fact that the Court in the *DuVall* case stressed that the statement was made by the Assistant United States Attorney, the one person who could grant favorable treatment. In the same case the Court refused to find that the *agents'* statement made prior to the signing of the waiver by the defendant—that the defendant would never see the light of day unless he cooperated—vitiated the voluntariness of his waiver or subsequent confession.

It is submitted that the circumstances in the instant case do not disclose any overbearing on the part of the DEA agents when the totality of the situation is considered. First, there is no evidence that defendant was subject to any threats, physical coercion or protracted interrogation. *United States ex rel. Lewis v. Henderson, supra*. Stewart's arrest, interview and arraignment were carried out in an expeditious fashion.

Even if we assume that the agents did comment as the defendant maintains (although that position is clearly controverted by the testimony of the two agents and accepted by Judge Curtin in his decision), it is clear that no specific promises were made. The defendant was simply informed that it would be to his benefit to cooperate. Such statements by law enforcement officials have not been considered to be overbearing. See, e.g., *United States v. Williams*, 479 F.2d 1138 (4th Cir.), *cert. denied*, 414 U.S. 1025 (1973); *United States v. Glasgow*, 451 F.2d 557 (9th Cir. 1971).

That this position is a correct statement of the law is clear from the decision in *United States v. Pomares, supra*, where the Second Circuit stated:

Surely, it is the duty of law enforcement officers to assemble all available evidence relating to the commission

of a crime, and this includes such information as a participant may be willing to give. Having fairly and fully advised [the defendant] of his constitutional rights, as required by *Miranda* the agents were free to discuss with [the defendant] the reasons why he should cooperate. It was quite proper in the course of such discussion to mention the situation which [the defendant] faced and the advantages to him if he assisted the government. The agents stated facts, they made no misrepresentations. Nothing the agents were shown to have said or done was unfair or overreaching. *United States v. Pomares, supra*, at 1222.

Additionally, it is important to note the defendant was not held in isolation during this questioning: throughout the entire evening leading up to and including execution of the waiver and confession, the defendant had his wife present at his side to counsel and support him. There was no surreptitious questioning of him, and this is not a case involving the type of detention which denies the defendant the psychological support of friends and relatives which would put him at an extreme disadvantage when confronting the authorities. *Haynes v. Washington*, 373 U.S. 563 (1963); *United States ex rel. Lewis v. Henderson, supra*.

Finally, Stewart admitted the rights were read to him and that he understood these rights:

The Court: Do you claim that when he explained, first of all, did he explain certain rights to you from a card?

The Defendant: Yes, he explained certain rights to me.

The Court: Alright. Did you understand at the time what he was saying to you?

The Defendant: Yes, I understood what he was saying to me, Your Honor. (Tr. 79).

It is submitted, therefore, that under the totality of circumstances, including the defendant's own testimony and the testimony of the DEA agents, the court below was certainly correct in finding that Stewart's testimony was not involuntarily given and evinced a desire on his part to barter with the DEA agents consciously divulging information to improve his position. Therefore, his waiver and subsequent confession is not the product of physical intimidation or psychological coercion such as to vitiate the voluntariness of any statement. To the contrary, it is the product of deliberate and voluntary effort at self-help made by the defendant after subjectively evaluating the circumstances he was in. Stewart has failed to demonstrate that this finding should be reversed as clearly erroneous. *United States v. Boston*, 508 F.2d 1177 (2nd Cir. 1972); *United States v. Gottfried*, 165 F.2d 360 (2nd Cir. 1948); *United States v. DiGilio*, 538 F.2d 972 (3rd Cir. 1976).

POINT II

Assuming admission of Stewart's statement was erroneous, it would not constitute harmless error in view of the overwhelming evidence against Stewart.

Stewart argues that if we assume there is error in admitting the statement at trial, that this was not harmless error and that the conviction should be set aside.

Initially, the actual three-page statement which was signed by Stewart was never admitted into evidence at this trial. The actual three-page statement was redacted at one point to delete any references in the statement to the co-defendant, Robert Stewart. The only mention made by any of the government agents to the statement on direct examination was at

pages 154 through 159 of the trial transcript wherein Agent William T. McDonald testified orally as to the general substance of the admissions in that statement. Agent McDonald related that Mr. Stewart agreed to make a statement "regarding his association with Mr. Stephen Castle and specifically, about any dealings in any controlled substances and in particular, heroin." (Tr. 155). Agent McDonald further testified as to the warnings which had been given to Mr. Stewart prior to the taking of the statement and he also stated at this time "in attempting to solicit his cooperation in this investigation, we advised him that anything,—any way he did help us, providing it was 100% truthful and continuous, that we would make this known to the court at the time of any sentencing or charges in connection with his association or involvement in these charges." (Tr. 159).

It was on cross-examination that the attorney for Stewart began to delve into the actual contents of this statement and an explanation of the writings thereon. (Tr. 169, 170). In fact, it was only at this time that at the request of the defense attorney, the statement was marked as an exhibit for identification. (Tr. 170). The purpose in marking this exhibit was evidently to have Agent McDonald read the caption at the top of the statement indicating that the statement was made relative to the narcotic trafficking of Stephen Castle. At no time was this exhibit ever moved into evidence nor produced for inspection by the jury in this case.

The government would contend that there was other overwhelming evidence of Stewart's guilt which would have led the jury to bring back a guilty verdict in this case. The bulk of the trial was taken up with the testimony of Stephen Castle concerning the background and nature of the heroin trafficking which he had been involved in. Castle's testimony was

corroborated by taped telephone conversations between Castle and the Washington, D.C. residence of Robert Stewart and by evidence of airplane flight tickets concerning the various trips made to Washington for the purchase of heroin. Both these phone conversations and the airplane tickets indicated the involvement of Douglas Stewart in this conspiracy.

Even if the testimony of Agent McDonald concerning Stewart's admission was set aside, the jury would certainly be able to make its own determination of Stewart's guilt by crediting the testimony of Stephen Castle along with listening to the tape recordings of conversations and viewing the other evidence which would corroborate the trips to Washington, D.C.

Therefore, even assuming *arguendo* that the oral statements were improperly admitted, they merely serve to highlight the narcotics trafficking activities of Stephen Castle and Stewart's involvement in it and are merely cumulative of the other overwhelming and uncontroverted evidence of Stephen Castle's involvement in the heroin trafficking business aided and abetted by Douglas Stewart. The conviction, therefore, should stand. *Chapman v. California*, 386 U.S. 18 (1967); *United States v. Williams*, 523 F.2d 457 (2nd Cir. 1975).

Notwithstanding the involvement and background of Stephen Castle, the record clearly indicates that the jury knew about the deal that Mr. Castle had to enable him to testify, knew of his rather sordid affair and relationship with the defendant's wife and Stewart himself, and were fully advised via the court's jury instructions that Mr. Castle's testimony must be evaluated with very careful scrutiny. Taking all this into consideration, there was still ample room for the jury to credit the testimony of Stephen Castle and take that into con-

sideration with the other government exhibits and find Douglas Stewart guilty. Therefore, the government would contend that even if the Court should find that the statement was improperly testified to by Agent McDonald, that the conviction stands in view of all the other evidence against Stewart.

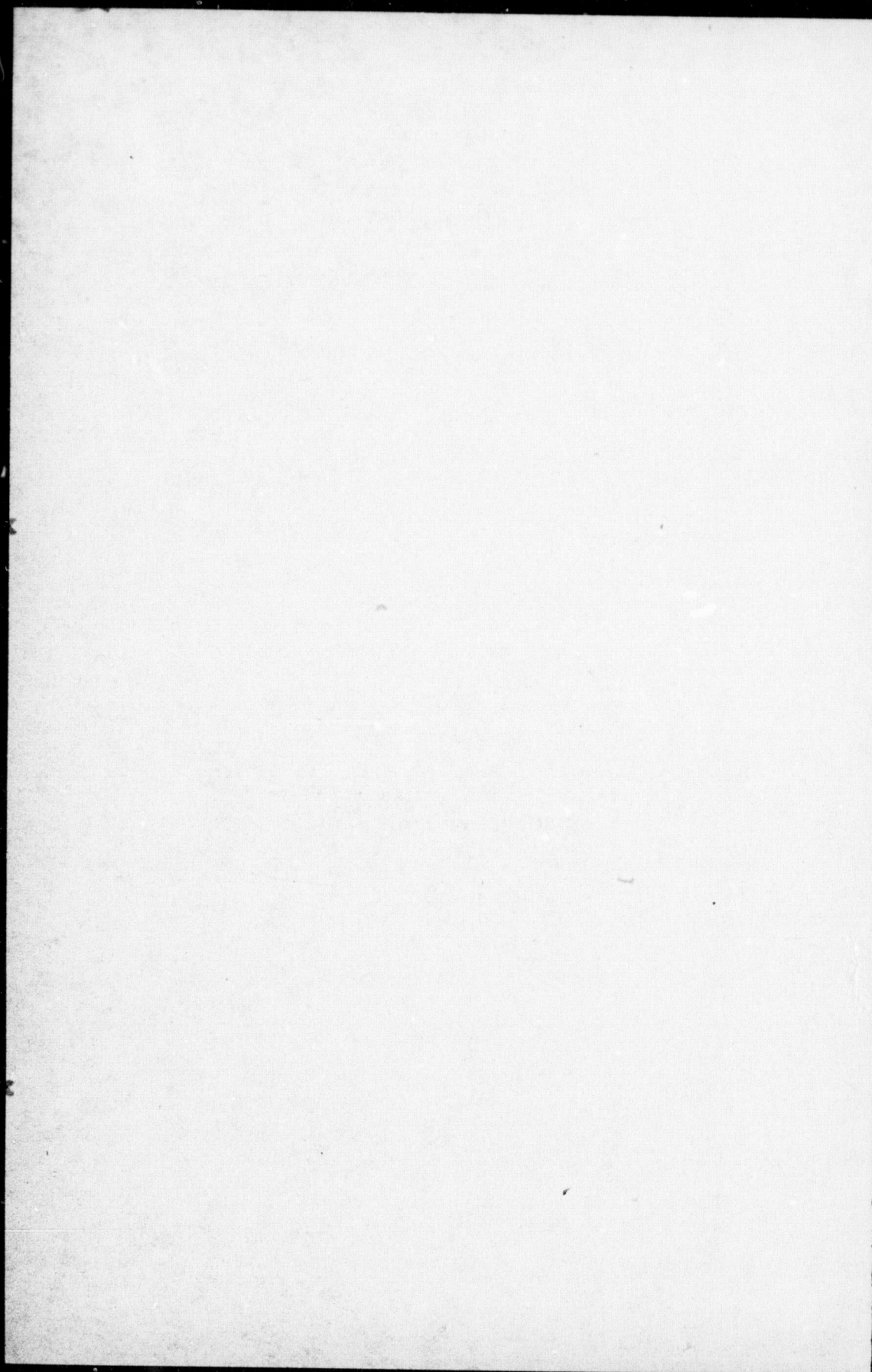
Conclusion

It is respectfully submitted that for the foregoing reasons Judge Curtin's denial of the suppression motion should be in all respects affirmed.

Respectfully submitted,

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77-1387
USA vs. Douglas Stewart

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
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On the 8th day of December, 19 77
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the above case, in a sealed, postpaid wrapper, to:

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Buffalo, NY 14202 Att: James A. Fronk Esq., Asst. US Atty

Leslie R. Johnson

Sworn to before me this

8th day of December, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1978